



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 201 and 237**

**[Docket DARS-2021-0023]**

**RIN 0750-AK77**

**Defense Federal Acquisition Regulation Supplement: Peer Reviews of Contracts for Supplies and Services (DFARS Case 2019-D037)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify internal processes for the conduct of peer reviews.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Ms. Barbara J. Trujillo, telephone 571-372-6102.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is amending the DFARS to revise the policies at DFARS 201.170 for the conduct of peer reviews by the Office of the Principal Director, Defense Pricing and Contracting (DPC). The rule removes the requirement for DPC-led, preaward peer reviews of competitive procurements valued at \$1 billion or more unless the Under Secretary of Defense for Acquisition and Sustainment

(USD(A&S)) is the milestone decision authority or unless USD(A&S) designates a competitive procurement as requiring a peer review, regardless of dollar value. Additionally, DoD components may request DPC-led peer reviews for competitive acquisitions valued below the \$1 billion threshold. DPC will conduct the reviews upon approval by the Director, DPC (Contract Policy).

The threshold for DPC-led, preaward peer reviews of noncompetitive procurements is increased from \$500 million to \$1 billion. Additionally, the requirement for DPC-led peer reviews of noncompetitive procurements will include any other contract actions USD(A&S) designates as requiring a peer review, regardless of dollar value. DoD components may request DPC-led peer reviews for noncompetitive acquisitions valued below the \$1 billion threshold. DPC will conduct the reviews upon approval by the Director, DPC (Price, Cost and Finance).

The rule includes clarification of the types of contract actions included in preaward peer reviews for noncompetitive procurements and guidance on how to identify the contract actions that are subject to preaward peer reviews for competitive and noncompetitive procurements. DoD components establish procedures to conduct preaward peer reviews of competitive and noncompetitive procurements that do not meet the criteria for a DPC-led review. The rule also removes DPC-led, postaward peer reviews of acquisitions for services from the

DFARS, and the cross-reference at DFARS 237.102-76 has been removed.

## **II. Publication of This Final Rule for Public Comment Is Not Required by Statute**

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41 U.S.C. 1707, Publication of Proposed Regulations. Subsection (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because the rule concerns DoD's internal review processes and does not have a significant cost or administrative impact on contractors or offerors.

## **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule does not create or revise any solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified

acquisition threshold or for commercial items, including commercially available off-the-shelf items.

#### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.) 12866 and E.O. 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

#### **V. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

## **VI. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for public comment.

## **VII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### **List of Subjects in 48 CFR Parts 201 and 237**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 201 and 237 are amended as follows:

1. The authority citation for 48 CFR parts 201 and 237 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

### **PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM**

2. Revise section 201.170 to read as follows:

#### **201.170 Peer reviews.**

(a) *DPC peer reviews.* (1) The Office of the Principal Director, Defense Pricing and Contracting (DPC), using the procedures at PGI 201.170, will organize teams of reviewers and facilitate peer reviews for solicitations and contracts as follows:

- (i) DPC will conduct the preaward peer reviews for

competitive procurements prior to the three phases of the acquisition (see PGI 201.170-2(a)) for all procurements with an estimated value of \$1 billion or more under major defense acquisition programs for which the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) is the milestone decision authority or USD(A&S) designates as requiring a peer review regardless of value. DoD components may request DPC-led peer reviews for acquisitions valued below the \$1 billion threshold. DPC will conduct these reviews upon approval by the Director, Defense Pricing and Contracting (Contract Policy).

(ii) DPC will conduct the preaward peer reviews for noncompetitive procurements prior to the two phases of the acquisition (see PGI 201.170-2(b)) for contract actions, e.g., new contracts, modifications to existing contracts, requests for equitable adjustment, claims valued at \$1 billion or more, or for any other contract action USD(A&S) designates as requiring a peer review regardless of value. DoD components may request DPC-led peer reviews for contract actions valued below the \$1 billion threshold. DPC will conduct these reviews upon approval by the Director, Defense Pricing and Contracting (Price, Cost and Finance).

(iii) Use the following criteria to identify actions that are subject to peer review (see also FAR 1.108(c), Dollar thresholds):

(A) If the not-to-exceed amount for an undefinitized contract action or an unpriced change order exceeds the peer

review threshold, then the resultant definitization modification(s) will be subject to peer review regardless of actual performance up to the point of definitization.

(B) For indefinite delivery indefinite quantity (IDIQ) contracts that will establish pricing terms that apply to orders, use the total maximum dollar value for purposes of the peer review threshold. IDIQ contracts that will not establish pricing terms in the basic contract are not subject to peer review, but individual orders that exceed the threshold are subject to peer review.

(C) For noncompetitive contract actions, use the greater of the following when considering the firm requirement for all supplies or services:

(1) The approved Government objective amount.

(2) The contractor proposed amount.

(2) To facilitate planning for peer reviews, the military departments and defense agencies shall provide a rolling annual forecast of acquisitions that will be subject to DPC peer reviews at the end of each quarter (i.e., March 31; June 30; September 30; December 31).

(i) Military departments and defense agencies shall submit quarterly forecasts for competitive peer reviews to the Director, Defense Pricing and Contracting (Contract Policy), at *osd.pentagon.ousd-a-s.mbx.dpc-cp@mail.mil*.

(ii) Military departments and defense agencies shall submit quarterly forecasts for noncompetitive peer reviews to the

Director, Defense Pricing and Contracting (Price, Cost and Finance), at *osd.pentagon.ousd-a-s.mbx.dpc-pcf@mail.mil*.

(b) *Component peer reviews.* The military departments and defense agencies shall establish procedures for—

(1) Preaward peer reviews of solicitations for competitive procurements not subject to paragraph (a)(1)(i) of this section; and

(2) Preaward peer reviews of noncompetitive procurements not subject to paragraph (a)(1)(ii) of this section.

#### **PART 237—SERVICE CONTRACTING**

##### **237.102-76 [Removed and Reserved]**

3. Remove and reserve section 237.102-76.

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